IN THE

Supreme Court of the United States

October Term, 1963

No. 3[illegible]

JOHN JOSEPH CRANE and ROBERT B. SILLS,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justice of the Supreme Court of the United States.

Comes now John Joseph Crane and Robert Bernard Sills, petitioners herein, by and through their undersigned attorneys, and respectfully pray this honorable court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 8th day of May, 1963, and the order of the same court denying rehearing entered on the 15th day of June, 1963.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 316 Fed. 2nd 907. The text of this opinion is found in Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Rule 37 (B)(1)(2) of the Federal Rules of Criminal Procedure and 28 U. S. C. 1254.

The United States Court of Appeals for the Fifth Circuit rendered its opinion in this case on the 8th day of May, 1963 (Appendix A) and thereafter a petition for rehearing was timely filed. Thereafter on the 15th day of June, 1963, the said Court entered its order denying rehearing without opinion.

Questions Presented

1. In the construction of 15 U. S. C., Section 77 (Q) (A), did the United States District Judge commit error when he in effect by the sentences imposed failed to follow the holdings in the second circuit to the effect that the violation of this section is predicated upon the fraudulent scheme employed in the sale of securities and not in the use of the mails which part is used solely to create a basis for federal jurisdiction, and each mailing or use of the mails does not constitute a separate crime or offense as set out in *United States* v. *Hughes*, D. C. N. Y., 1961, 195. F. Supp. 795.

2. Did the United States District Judge commit error when he refused to grant the petitioners a new trial when

it was discovered that the prisoners had been led into the court room hand-cuffed and shackled together while prospective members of the jury panel were present. And further, the taking out and bringing in of the petitioners to the Federal building each day of the trial while hand-cuffed and shackled together, after having walked four blocks in the presence of a Deputy United States Marshal.

3. Did the United States District Judge commit error when he refused to grant the petitioner, John Joseph Crane, as president of Insured Capital Corporation, motion to suppress the evidence in the form of the books and records of the said corporation, which had been seized by a subpoena *duces tecum* issued under the laws of the State of Florida.

Statutes and Rules Involved

18 U. S. C. 371;
18 U. S. C. 1341;
15 U. S. C. 77 (Q) (A);
Rule 41 (E) of the Federal Rules of Criminal Procedure.

Statement of the Case

These proceedings were commenced by the indictment in Eleven (11) Counts of Robert Zane, Herbert Gilmore, Joseph A. Peel, Jr., John Joseph Crane, Robert Bernard Sills and Floyd A. Holzapfel, filed June 15, 1961, in the United States District Court for the Southern District of Florida.

The indictment charges offenses committed in the Southern District of Florida, to wit: the first Five Counts allege the formation of a scheme to defraud and the use of the mails in the furtherance of the device and scheme to defraud, by all of the defendants, in violation of Section 77 (Q) (A), Title 15, United States Code. Counts Six (6) through Ten (10) re-allege the devising of a scheme to defraud by the defendants and charge the placing, in an authorized depository for mail matter, of letters for the purpose of executing the scheme to defraud, and to obtain money and property and fraudulent pretenses, representations and promises, in violation of Section 1341, Title 18, United States Code. Count (11) Eleven charges the formation of a conspiracy among the defendants to wilfully and knowingly violate Section 77 (Q) (A), Title 15, U. S. C., and Section 1341, Title 18, U. S. C., in violation of Section 371, Title 18, U. S. C., and sets forth Eight (8) overt acts committed by the defendants in pursuance of said conspiracy.

The appellants, on the 21st day of November, 1961, filed their motion to require the United States of America, to furnish them with an exact copy of all "Documents * * * and all other written material to be offered or which will be sought to be offered in evidence.

At this time these defendants—in fact, each defendant named in the indictment—had no knowledge that the United States had all the files, papers, letters and records of the corporation which was set forth in the indictment as Insured Capital Corporation.

On the 1st day of February, 1962, the Honorable George W. Whitehurst entered an order that said motion be denied with the exception that the government was ordered to permit the defendants to inspect and copy or photo

graph the following items: (A) the letters that are made the basis of the individual Counts of the indictment; (B) the financial statements mentioned in Paragraph 7 of Count One of the indictment; and; (C) the advertisements (newspapers) mentioned in Paragraph 9 of Count One of the indictment.

Appellants designated this ruling as error in their motion for new trial (Ground Number 5), and assert it as a question involved in this appeal.

The trial of this cause began on March 19, 1962, in Orlando, Florida, and proceeded against defendants, Zane, Gilmore, Peel, Crane and Sifls, defendant Holzapfel having been granted a continuance on the same date as to the charges against him.

At the trial of this case, on the first day of taking of testimony, the Government produced for the first time all the office files and records of the corporation which was alleged by the government to have been set up by these defendants for the carrying out of the scheme to defraud and in furtherance of said scheme, and the entire government's case was built upon and around these records so produced.

The government had obtained the foregoing files, papers letters and other such documents in the following manner: the County Solicitor of Orange County, Florida, (the officer charged with the prosecution of all felonies less than capital in nature in Orange County, Florida) in October of 1960, caused to be issued by the Criminal Court of record of that county a subpoena *duces tecum* directed to Miss R. G. Edminson, as secretary-treasurer of Insured Capital Corporation, the company which was said by the government to have been the vehicle through which the defendants consummated their frauds. The subpoena was

returnable *instanter* and directed that Miss Edminson bring "all the books and records" of the corporation to the Solicitor's Office (T. 183-184).

The two sheriff's deputies who served the subpoena assisted her in gathering up these books and records and taking them to the Solicitor's Office.

From this time up until two weeks before trial of this cause, a period of almost one year and a half, the books and records were kept in the possession, custody and control of the County Solicitors Office. At no time during this period had an order issued from any court impounding the books and records. Neither of these appellants nor any of the defendants was under indictment by the State Grand Jury or was informed against by the County Solicitor's Office at the time the books and records were seized nor thereafter.

During the months of October and November, 1960, representatives of the Florida Securities Commission and the United States Securities Exchange Commission were permitted to examine the books and records in the County Solicitor's Office (T. 279-280).

Two weeks prior to trial, the books were voluntarily turned over to these same representatives who kept them in their possession until they were produced in trial (T. 251-263) at no time had an order issued from the Trial Court impounding the books and records.

No subpoena duces tecum was issued by the United States to the County Solicitor of Orange County until the Friday preceding the beginning of the trial on Monday and after the files, books and records were already in the possession of the United States Attorney and had been for some period of time (T. 262).

On March 20, 1962, when Government witnesses testified as to the method of initial acquisition of the books and records, appellants orally moved to supress them as evidence. On the following day, with the permission of the Court and pursuant to directions by the Court, these appellants filed a written motion for return of property and to suppress evidence. Argument was had, and the Court made its ruling to the following day. On March 22, 1962, the Court entered its ruling denying appellants' motion.

> "After hearing the arguments by counsel for all of the defendants as well as the Government, the Court had reached the conclusion and so holds:
>
> (1) That none of the defendants are persons aggrieved by an unlawful search and seizure within the contemplation of Rule 41 E of the Federal Rules of Criminal Procedure and therefore are without standing to obtain the relief sought by such motions.
>
> And (2) that property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in the possession of the officials of Orange County, Florida, until it was delivered to the United States Security and Exchange Commission for use in the prosecution of this case and that such property is now lawfully in the control and possession of the United States Attorney for this district.
>
> Each of such motions for the return of such property and the suppression of evidence is therefore denied" (T. 343-344).

Appellants designated this ruling as error in their motion for new trial (Ground Number 6) and assert it as a question involved in this appeal.

At the closing of the evidence the Court dismissed Counts Four (4) and Ten (10) of the indictment and Number Five (5), Number Six (6), Number Seven (7) and Number Eight (8) of the overt acts charged under Count Eleven (11), (the conspiracy) of the indictment.

On April 3, 1962, a verdict of guilty was returned by a jury to the four remaining charges of using the mails to defraud in violation of 15 U. S. C. 77 (Q) (A), the four remaining charges of violating 18 U. S. C. 1341, and the one charge of violating 18 U. S. C. 371, by conspiring to violate Section 77 (Q) (A) Title 15, U. S. C. and Section 1341, Title 18, U. S. C.

Timely motion for a new trial was thereafter filed and on the 12th day of April, 1962, the United States District Court for the Southern District of Florida, Orlando, Division, denied these defendants' motion for a new trial and entered its judgment and sentence of eighteen (18) years imprisonment against these defendants and notice of appeal was timely filed thereafter.

Respectfully submitted,

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Attorneys for the Petitioners.

Reasons for Granting Writ

Question No. 1. In the construction of 15 U. S. C. Section 77 (Q)(A) there is a myriad of holdings in the Second Circuit to the effect that the violation of this section is predicated upon the fraudulent scheme employed in the sale of securities and not in the use of the mails which is solely to create a basis for federal jurisdiction. These holdings are legion to the effect that each mailing or use of the mails does not constitute a separate crime or offense. Accordingly, for example, in the *United States v. Hughes*, D. C. N. Y. 1961, 195 F. Supp. 795, the Court consolidated the multiple counts of the indictment, each one alleging a mailing in carrying out the scheme to defraud, with the holding as enunciated by the Court of Appeals, that each mailing did not constitute a separate crime. In other jurisdictions there are holdings to the contrary. In the case at bar, each mailing in the First Five Counts of the indictment was held to be a separate crime or offense, contrary to the express holdings in the Second Circuit, with the result that petitioner's received a sentence of eight years when, in the Second Circuit the maximum sentence which could have been imposed by the Court was the term of two years.

With respect to the Five Counts of the indictment charging a violation of the mail fraud statute arising out of the sale of securities, there is likewise a conflict between the various circuits in their holding individually, as some holdings are to the effect that a violation stemming from the commission of identical acts constituting a crime could not under different statutes give rise to multiple crimes in the one case and in a single crime in the other case. It is respectfully submitted that conflict between the decisions of the Circuit Courts of Appeals require the granting of certiorari in the case at bar.

Question No. 2. The issue raised in this question strikes at the very heart of the "fair and impartial" requirements of our system of justice.

It is impossible for the Court to say under the facts of this case, that the petitioners, John Joseph Crane and Robert Bernard Sills, were given a fair and impartial trial; free also from bias and prejudice.

On the first day of the trial, petitioners were brought into the Court room in handcuffs and shackled. There were several persons present in the Court room when this incident occurred. A feeble effort was made by the Court to correct this extremely prejudicial occurrence by asking one or two persons if they had observed the petitioners while in handcuffs and shackled. These denied seeing anything. It cannot be assumed that prospective jurors did not witness this act. No effort was made by the Court to see if prospective jurors sitting in the hall had seen the petitioners in chains. Certainly a new jury panel should have been called to prevent the grave possibility of an injustice being done.

In addition to the courtroom incident, petitioners were brought in and taken out of the Federal Court building in handcuffs and shackles. It was necessary to pass through the hallway used by the trial jurors, to remove the petitioners from the courtroom. In additoin, petitioners were required to walk four (4) blocks morning and evening, chained together, to reach the county jail where they were lodged during the trial.

It would be impossible to have a fair and impartial trial under these conditions because of the conflict between the Fifth Circuit and other Circuits, this matter should be properly decided by this Court.

Question No. 3. Prior to trial application was made for discovery of all of the corporate books and records of Insured Capital Corporation, and the United States of America failed to disclose that they had either possession or control of the books, records and files of the Insured Capital Corporation.

However, upon the trial it appeared that the books and records of Insured Capital Corporation had been obtained by the County Solicitor of Orange County, Florida, pursuant to a subpoena. The books and records were turned over to the County Solicitor by an employee, not an officer, of Insured Capital Corporation, and on the eve of the trial they were turned over to the United States Attorney in charge of the prosecution of this action. A subpoena for their production upon the trial was first served the day the trial began, after the documents in question were already in the possession of the United States Attorney.

The defendants immediately made application to suppress the books and records of Insured Capital Corporation, predicated upon their acquisition as a result of an unlawful and illegal search and seizure by the officials of the State of Florida, and upon the further ground that their wrongful search and seizure by the State officials precluded their subsequent use by the Federal authorities upon the trial of this indictment. This motion was denied upon the trial after being made during the trial, although it was and is contended that the illegal search and seizure was a violation of the Constitutional rights of the defendants.

Each petitioner herein denied any knowledge of any wrongdoing by the principals of Insured Capital Corporation.

The petitioner John Joseph Crane, who was president of the said corporation, raises the protection accorded him by the Constitution against self incrimination. The records seized and secreted until the day of the trial, should not have been admitted as to him.

Since this is a seizure on the old "silver platter" doctrine, which has been declared unconstitutional, this Court should resolve this apparent conflict with the Fifth Circuit Court of Appeals.

Certificate of Service

I, E. Coleman Madsen, attorney for the petitioners, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing was mailed this .... day of August, 1963, to the Solicitor General, Department of Justice, Washington, D. C.

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20003

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

May 8, 1963

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

TUTTLE, Chief Judge: These are separate appeals on behalf of the five appellants who were tried and convicted in the Southern District of Florida for violating

the anti-fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §17(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the conspiracy provisions of the criminal Code, 18 U. S. C. A. §371. A sixth alleged conspirator, Holzapfel, named in the indictment, was granted a continuance and severance for trial. Certain counts of the indictment and certain overt acts of the conspiracy count were dismissed on motion of the Government prior to the submission of the case to the jury. The jury then found the appellants guilty on all nine counts submitted to them.

The grounds of the appeal may be divided generally into three categories. The first, applicable to all the appellants, is their contention that the indictments and convictions were based on evidence which was obtained by the Government as the fruits of an illegal seizure. The second is the contention, made separately, on behalf of all except Peel, that the evidence was insufficient to warrant submission of their respective cases to a jury. The third is based on alleged errors of the trial court having to do with overruling objections to the introduction of testimony and on other actions of the trial court.

We deal first with the contention of the defendants that the trial court erred in not suppressing, and in not excluding from evidence, the books and records of Insured Capital Corporation, the corporate vehicle through which the Government sought to prove the defendants carried on their fraudulent scheme. These books and records were obtained from the office of Insured Capital Corporation in Orlando, Florida, where they were in the formal custody of a Miss Edminson, who was the Secretary-Treasurer of the corporation. The record made before

the trial court on the motion to suppress, and in support of subsequent objections to the introduction of the records in evidence, shows that none of the appellants was an officer or director of the corporation at the time the records were obtained. Evidence which both the trial court and the jury could believe tended to prove that three persons, Peel, Holzapfel and one Miles, who testified on behalf of the Government and who was named as a co-conspirator, but not as a joint defendant in the prosecution, were the principal operators of the business that had been transacted at the office of Insured Capital Corporation. There was also evidence that Sills and Crane had both been engaged under the direction of the first named three persons in carrying on certain of the functions of the business, and that Zane and Gilmore had been present in Orlando or the office of the corporation only once or twice and held no office or position with the company.

In this state of affairs, the County Solicitor of Orange County, Florida, acting under a Florida statute, Section 32.20,[1] caused a subpoena duces tecum to be served on Miss Edminson to produce all of the books, ledgers, stock certificate books, bank records, and all other documents relating to the operation of Insured Capital Corporation. Miss Edminson complied with this subpoena and turned the corporation's books over to the state officer without demur or complaint. These records were retained in the office of the County Solicitor for approximately a year

[1] "To have process.—The County Solicitor is allowed process of his court to summons witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons to testify before him as to any violation of the criminal law which they may be interrogated."

and a half without any demand being made for their return or any effort being made by the corporation, any of its officers, or any of the appellants seeking a return of the books. It does not appear that there was any office of the corporation maintained thereafter to which the books could be returned, or that there was any officer of the corporation who was interested in receiving them.

During the period of their custody by the County Solicitor's office, they were made available to investigators from the Securities & Exchange Commission and other federal agencies. Based at least in part on information obtained from the records, indictments were drawn and presented to the Federal Grand Jury, charging these appellants and Holzapfel with the offenses on which they have now been convicted. The books and records were actually subpoenaed by the United States Attorney a short time before the trial, after they had been physically surrendered by the County Solicitor's office to the United States Attorney's office for use on the trial.

Appellants contend that the acquisition of the records in this manner was an illegal seizure in violation of the Federal Constitution and that under the principle announced in *Jones* v. *United States*, 362 U. S. 257, and *Henzel* v. *United States*, 5 Cir., 296 F. 2d 650, a decision by this Court, they have sufficient standing as "aggrieved persons" to have the documents suppressed when sought to be used against them.

It is clear that the *Jones* case, while greatly relaxing the requirement as to the interest an accused must have in order to have standing to attack an illegal search or

seizure, does not cover the factual situation such as here before us. In *Henzel* v. *United States*, this Court found that where a Federal Investigating Officer, by agreement with a state court receiver of a corporation which was wholly owned and wholly operated by the accused, obtained delivery of all of the corporation's and some of the accused's personal papers in an investigation that was being conducted against the accused, the seizure of the papers was illegal and the accused had adequate standing to attack the seizure. In arriving at this conclusion, however, this Court made the following caveat:

> "This is not to say that every employee of a corporation can attack the illegal seizure of corporate property if the fruits of the search are proposed to be used against him. Each case must be decided on its own facts. We only hold, under the facts presented here, the appellant had a sufficient interest in the property seized and premises searched to enable him to challenge the propriety of the Government's conduct under Rule 41(e)."

Here the subpoena duces tecum ran to the corporation and was served on the Secretary-Treasurer, the only person in charge of the corporation at the time of service. Appellants did not allege in the trial court that this acquisition of the records by the County Solicitor's office was itself illegal under the laws of the state of Florida. Nor did they allege that the Florida statute authorizing it violated the Federal Constitution. They do here in the Court of Appeals for the first time seek to attack the legality of this seizure by the state officials. Nevertheless we do find that the trial court, in passing on the motion to suppress, made a finding to the following effect:

Appendix A

> "The property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in (sic) the possession of officials of Orange County, Florida, until it was delivered to the United States Securities & Exchange Commission for use in the prosecution of this case, and that such property is now lawfully in control and possession of the United States Attorney for this District."

Thus it appears that for a period of more than a year the County Attorney's office was in possession of the papers, subject to the right of any person having a legal interest in them to seek their return; during this time the corporation ceased operating, if in fact it had ever been operating in the true sense of the word, and during the entire period of time no persons showed the slightest interest in these papers or their custody. During this period, they were inspected by the Government agents and subsequently subpoenaed for use on the trial. We think we do not come to the question whether these appellants had standing to attack the seizure, because we find nothing in these circumstances that constitutes an illegal seizure even as to the corporation itself. As the proper custodian of the records of the corporation, Miss Edminson had a right to act on behalf of the corporation to surrender the records to a public official on proper request, either with or without a formal subpoena duces tecum. Such surrender would be binding on the corporation. It has long been held that while a corporation is protected by the illegal search and seizure provisions of the Fourth Amendment, *Silverthorne Lumber*

Co., Inc. v. *United States*, 251 U. S. 385, that very case recognizes that a corporation's papers, unlike those of an individual who is to be prosecuted, are subject to subpoena. In commenting on *Linn* v. *United States*, 251 Fed. 476, the Supreme Court said:

> "In Linn v. United States . . . it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers; the rights of a corporation against unlawful search are to be protected *even if the same result might have been achieved in a lawful way.*" (Emphasis added)

Clearly the lawful way of achieving this result was by issuing a subpoena to cause the corporation's books to be produced. This is the basis of the decision in *Linn* v. *United States*. See also *United States* v. *White*, 322 U. S. 694 and *Hale* v. *Henkel*, 201 U. S. 43. Both of these cases explicitly deal with the right to subpoena a corporation's books, even though such books may tend to incriminate an officer or other person connected with the corporation.

There was, of course, available to the corporation the right to move to quash the subpoena, a matter to be tried by the Florida court before complying with the subpoena. See *Vann* v. *State*, 85 So. 2d 133. The availability of this right to a hearing before compliance satisfies the requirements of due process.

We next turn to the contentions by the several appellants that the evidence is not sufficient to warrant their conviction. We have carefully read the record references dealing with the testimony by which the Government seeks to tie Zane and Gilmore into the illegal acts. It is clear that the jury could believe that Peel, Holzapfel and

Miles had several conversations with these two appellants in their Miami office, and that together they worked out the plan which was actually put into effect—that is, that a company would be set up which would purport to sell its promisory notes to the investing public, which notes would bear interest at 8% and which purported to be secured by valid loans held by the company representing automobile or furniture chattel mortgages or purchase money notes, whereas in fact all of the proceeds from the sale of the notes by the corporation would be divided among the participants of the scheme. Moreover, we think it plain that the jury could believe testimony to the effect that substantial sums were actually paid for the benefit of Zane and Gilmore to their nominee, Mr. Bobbs Autos. Appellants attack the testimony dealing with the association of Zane and Gilmore with the operation on the ground that it was given substantially by a single witness, Miles, who was an admitted participant in the fraudulent transaction. While this circumstance leaves it open to the jury to view the testimony with skepticism, it does not destroy its weight or sufficiency once it is accepted as true by the jury. Once the trial court charged the jury adequately with respect to accomplice testimony, the jury could base its conviction entirely on the testimony of such accomplice. *Lutes v. United States*, 5 Cir., 249 F. 2d 744. Moreover as to part of Miles' testimony, there was corroboration. Gilmore and Zane were shown to have at least some interest in purchasing of the furniture for the Orlando operation from a furniture dealer in Miami. Miss Edminson testified that they came to the Orlando office "once or twice", that they "came in early one morning and left after

dinner," and that they talked with Miles and Crane, Sills and Peel. Furthermore, one of the checks drawn payable to Mr. Bobbs Autos, appears to have been endorsed by Zane. We conclude that the jury's verdict finding these two appellants participants in the crime was amply supported.

Looking next at the evidence seeking to implicate Sills and Crane, we find that in the latter period of the operation Crane was actually president of the company at a time when the investors were being bilked out of their so-called investments. Moreover the books and records of the corporation show that from March, 1960, to September, 1960, checks for $148,000 were made payable to Crane. Sills was a salesman, whose only defense seems to have been that in making his sales he did not know that the corporation was a complete fraud. He used the names of Miles and Crane on some occasions. The fact that Sills himself participated in the false representations to some of the investors and, for substantial commission, caused substantial sums to be invested in the company which were thereafter used in a manner inconsistent with the representations brings him, as does the testimony against Crane, within the language of a recent case of this Court. We believe that the jury might well have believed, as we stated in *Sherwood* v. *United States*, 5 Cir., 300 F. 2d 603, 605, that it "was inconceivable that he did not know anything about the stock he and his salesmen were selling, especially in view of the fact that the Continental stock was virtually the only stock they were selling for an eight or nine month period."

Appendix A

Appellant Peel does not contend that there was not sufficient evidence on which the jury might find him guilty of the crimes charged. The investors' testimony, together with that of Miles, clearly prove that the Government's main contention with respect to the fraudulent transaction and the use of the mails pursuant thereto, as well as the conspiracy, were sufficiently proved to go to the jury as to all defendants.

We have carefully considered the contentions of Sills and Crane that the trial court deprived them of a fair trial by reason of "inflammatory and prejudicial statements." We conclude that appellants have made no such showing as this Court referred to in *Kowalsky* v. *United States*, 5 Cir., 290 F. 2d 161, where we said that with respect to such an attack there must be a "clear showing . . . that the conduct was such as to carry a prejudice with it. . . . There must be something more to justify a retrial than a mere suspicion or feeling that prejudice may have resulted from this course. It must appear plain and clear." In this long trial, the trial court showed no leanings which could reasonably be calculated to prejudice either the accused or the Government.

Equally without merit is the contention made by Sills and Crane that they were brought into the courtroom on the first day, prior to the commencement of the trial, with handcuffs on. The trial court sought to ascertain whether any of the jurors observed anything of this nature, and this investigation failed to show any of them noticed their entrance at all and thus failed to show any prejudice to the appellants.

The contention on Peel's behalf that he was prejudiced by an inadvertent remark during argument of

counsel for appellants Crane and Sills to the effect that Peel and Sills had not testified, does not warrant a determination by this Court that Peel was prejudiced by such remark which was inadvertently made by counsel for a co-defendant. The court took immediate and prompt action to correct the error. The case is quite different from *DeLuna* v. *United States*, 5 Cir., 308 F. 2d 140.

We have considered the other contentions made by the appellants but find that there is no merit in any of them. The judgment of the trial court is therefore,

AFFIRMED.

IN THE

Supreme Court of the United States

October Term, 1963

No. 370

ROBERT ZANE and HERBERT GILMORE,

Petitioners,

AGAINST

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ROBERT ZANE and HERBERT GILMORE,

Petitioners,

AGAINST

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners, Robert Zane and Herbert Gilmore, respectfully pray that a Writ of Certiorari issue to review the decision (Appendix A) and judgment (Appendix B) of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Florida wherein petitioners were tried and convicted for violating the Anti-Fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §77(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the Conspiracy statute, 18 U. S. C. A. §371.

Opinion Below

The United States Court of Appeals for the Fifth Circuit rendered its opinion set forth herein as Appendix A. No formal opinion was rendered in the United States District Court for the Southern District of Florida on petitioners' motion for a mistrial or on petitioners' application to suppress evidence predicated upon illegal search and seizure, but the oral decision of the Court is contained in the record (37, 42) with respect to the motion for a mis-trial and at (342-344) with respect to the motion to suppress.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, U. S. C. §1254 and petitioners' cause is founded, in addition, upon rights secured by the Constitution of the United States and specifically the Fourth and Fourteenth Amendments thereto.

Questions Presented for Review

1. The first five (5) counts of the indictment charge a violation of the Anti-Fraud provisions of the Securities Act, 15 U. S. C. A. §77(q)(a) in that, the defendants in the sale of securities devised and employed a fraudulent scheme to defraud and used the United States Mails in furtherance of the said fraudulent scheme. This indictment charges each mailing in furtherance of the scheme as a separate crime. Petitioners have been convicted of four (4) of the five (5) Securities Act counts charged in the indictment and have received consecutive sentences of two (2) years on each such count making a

total of eight (8) years imprisonment on these counts. Other jurisdictions hold that each mailing or use of the mails does not constitute a separate crime or offense, the gist of the crime being the fraudulent scheme employed in the sale of securities; holding that the use of the mails is incidental to and requisite merely to give jurisdiction to the Federal Courts. This statutory provision is the subject of conflicting decisions in different Courts of Appeals in the United States. The question presented is whether under the statute each mailing constitutes a separate crime or offense or whether there is but one crime or offense charged irrespective of the number of mailings involved.

2. Counts 6 through 10 of the indictment allege a violation of the Mail Fraud Statute, 18 U. S. C. §1341 and set forth five (5) separate mailings constituting five (5) separate crimes. Petitioners have been convicted on four (4) of such counts and have received four (4) consecutive two (2) year sentences making a total of eight (8) years imprisonment on these counts. The indictment discloses that the identical acts of omission, commission and course of conduct by petitioners during the same period of time in some jurisdictions give rise to but one violation of law under the Securities Act, 15 U. S. C. 77(q)(a) and yet give rise to multiple crimes under the Mail Fraud Statute, 18 U. S. C. §1341. It is alleged that each mailing constitutes a separate crime under the Mail Fraud Statute whereas each mailing does not constitute a separate crime under the Securities Statute. The question is whether the omission or commission of identical acts at identical times can give rise to multiple, separate, mutually exclusive crimes which would subject petitioners to totally different punishment and sentences by the Court based upon the format of the indictment. The

question is whether a single, continuing transaction and course of conduct may be split into more than one count of the indictment in order to prolifgrate penalties.

3. At the inception of the trial the record discloses that co-defendants of petitioners Robert Zane and Herbert Gilmore, were brought into Court in the presence of jurors and prospective jurors in shackles and handcuffs. The question presented is whether the denial of the motion for a mis-trial on this ground was a denial of due process of law and a denial of a fair trial to petitioners herein.

4. Books and records of Insured Capital Corporation, a Florida corporation, were used in evidence against petitioners upon the trial. The books and records were obtained by the County Solicitor of Orange County, Florida, pursuant to a subpoena and the books and records were turned over to the County Solicitor by an employee not an officer or person in authority of Insured Capital Corporation. On the eve of trial they were turned over to the United States Attorney in charge of the prosecution of the trial of this indictment by the County Solicitor of Orange County, Florida. Thereafter when the trial began, a subpoena for their production upon the trial was first served upon the County Solicitor of Orange County, Florida, requiring the production upon the trial of books and papers already in the possession of the United States Attorney. Concededly no search warrant was ever issued for their production and use. The question presented is whether the motion made by the petitioners Robert Zane and Herbert Gilmore during the trial to suppress such evidence as having been illegally obtained in violation of the Constitution of the United States was erroneously denied by the Court.

5. The question presented is whether there is an unconstitutional and unlawful delegation of power and discretion vested in an administrative official; to wit, the United States Attorney, to determine and decide what crimes shall be charged against defendants based upon the commission of the same acts or omissions and based upon the same conduct complained of and further, what sentences of imprisonment might be imposed upon a defendant based upon such acts of omission, commission or conduct which gives rise to violations of several penal statutes. The indictment in the case at bar sets forth identical acts which it is alleged are five (5) violations of the Securities Act, 15 U. S. C. A. §77(q)(a), five (5) violations of the Mail Fraud Statute, 18 U. S. C. A. §1341 and one (1) violation of the conspiracy statute, 18 U. S. C. A. §371. The transcript of proceedings before the Grand Jury as well as the trial of the indictment, disclosed that the United States Attorney has the power, authority and discretion to determine which violations of statute should be alleged and tried and which punishments and sentences the defendant must face for acts of omission or commission applicable to three separate statutes.

Statements of Facts

The facts in the indictment allege that petitioners participated in the formation of Insured Capital Corporation, a Florida corporation in October, 1959 and engaged in the business of selling chattel mortgage notes to the public, payable within a period of one (1) year, bearing interest at eight (8%) percent per annum. The mortgage notes were to be secured by collateral derived from various financial investments of Insured Capital Corporation, including mortgages on automobiles and other high interest-bearing investments.

It was alleged that the defendants pocketed the proceeds of the sale of the mortgage notes of Insured Capital Corporation, never engaged in any proper business operations, and falsely and fraudulently represented to the public in the solicitation of money for the sale of such mortgage notes, matters which were false and untrue in many respects.

Prior to trial, application was made for discovery of all of the corporate books and records of Insured Capital Corporation, and the United States of America failed to disclose that they had either possession or control of the books, records and files of Insured Capital Corporation.

However, upon the trial it appeared that the books and records of Insured Capital Corporation had been obtained by the County Solicitor of Orange County, Florida, allegedly pursuant to a subpoena. The books and records were turned over to the County Solicitor by an employee, not an officer, of Insured Capital Corporation, and on the eve of the trial they were turned over to the United States Attorney in charge of the prosecution of this action. A subpoena for their production upon the trial was first served the day the trial began, after the documents in question were already in the possession of the United States Attorney.

No search warrant was ever issued in either the State or Federal Courts in connection with such books and records.

The defendants immediately made application to suppress the books and records of Insured Capital Corporation, predicated upon their acquisition as a result of an unlawful and illegal search and seizure by the officials of the State of Florida, and upon the further ground that their wrongful search and seizure by state officials

precluded their subsequent use by the Federal authorities upon the trial of this indictment. This motion, made during the trial, was denied, although it was and is contended that the search and seizure was illegal, a violation of the constitutional rights of the defendants.

At the inception of the trial, motions for a mistrial were made predicated on the fact that co-defendants of petitioners Zane and Gilmore were brought into the Court Room in shackles in the presence of sworn and prospective jurors (S. M., p. 34). In spite of this manifest prejudice, the motions were denied.

Each petitioner herein denied knowledge of any wrongdoing by the principals of Insured Capital Corporation.

Petitioners Zane and Gilmore contended throughout the trial that they had nothing whatever to do with this corporation, being neither stockholders, officers, directors nor persons in any way interested in the financial or other affairs of the corporation.

The verdict of the jury was to the contrary.

Petitioners were found guilty of nine (9) counts of the indictment and received nine (9) consecutive two (2) year terms of imprisonment, making a total of eighteen (18) years imprisonment to be served.

The Court of Appeals sustained the verdict of the jury based upon the evidence before the trial court.

Reasons for Issuance of the Writ

The holding of the Court of Appeals, affirming the judgment of conviction of the multiple counts of this indictment, raises questions of substantial importance and wide-reaching consequences and impact.

1. The Federal statutes involved are the subject of conflicting decisions in different Courts of Appeals in the United States requiring that such conflict be resolved by this Court.

The construction of the Securities Act, Title 15 U. S. C. §77(q)(a), has been the subject of diverse, inconsistent holdings in various Courts of Appeals of the United States.

In *United States v. Hughes*, D. C. N. Y., 1961, 195 F. Supp. 795, the Court consolidated multiple counts of an indictment under 15 U. S. C. §77(q)(a) holding that each mailing did not constitute a separate crime and basing its statutory construction on *United States v. Cashin*, C. C. A. 2d 1960, 281 F. 2d 669, stating the rule as follows:

> "Defendant contends that counts 1 to 15 inclusive, all charge one and the same offense. Each alleges that all defendants caused to be carried through the mails on a certain date certain matter enclosed in an envelope bearing a certain address. They differ only in that each alleges a different mailing.
>
> The statute in Section 17(a) makes it unlawful 'in the offer and sale of any securities by the use of any means of instruments of transportation or communication in Interstate Commerce or by the use of mails, * * * *to employ* any device * * * or *to obtain* money * * * or *to engage* in any transaction (emphasis supplied).
>
> "The gist of the crimes charged in the indictment as in most Securities Act cases, is the fraudulent

scheme employed in the sale of securities. See *United States* v. *Robertson*, D. C. N. Y., 1959, 181 Fed. Supp. 158, *United States* v. *Monjar*, supra. The purpose of the requirements that there be a use of the mails or other facilities of commerce is solely to create a basis for Federal jurisdiction. *Cresswal-Keith, Inc.* v. *Willingham*, 8th Cir. 1959, 264 Fed. 2d 76, *Schiller* v. *H. Vaughan Clarke & Co.*, 1943, 134 Fed. 2d 875, *United States* v. *Robertson*, supra."

Since the gist of the crime is the fraudulent scheme and the purpose of the requirement that there be a use of the mails or other facilities, is solely to create a basis for federal jurisdiction, * * * the multiple mailings in carrying out the scheme do not constitute separate crimes. Each device to defraud or each obtaining money by false statements or other transactions which operate as a fraud, may be a separate crime but not each use of the mails or Interstate Commerce."

The Court of Appeals for the Fifth Circuit has held diametrically to the contrary to the holding of the Court of Appeals in the Second Circuit wherein petitioners have been convicted and sentenced on four (4) separate counts of a violation of Title 15 U. S. C. 77(q)(a) holding each separate mailing in furtherance of the scheme to defraud is a separate crime.

This manifest inconsistency in the holdings of the Courts of Appeals should be resolved by this Court and petitioners' sentence reviewed and reduced accordingly.

2. The record discloses that co-defendants of petitioners herein were brought to the Court House and brought into the Court Room in shackles and handcuffs

by United States Marshalls in full view of sworn and prospective jurors. A motion for a mistrial was immediately made predicated upon this manifest prejudice, a denial of a fair trial and due process of law. The denial of a mistrial by the Trial Court and the refusal of the Court of Appeals to recognize this manifest injustice, is sanction for such future conduct of United States Marshalls in the custody and care of prisoners awaiting trial, being brought to trial and being brought before the Court.

It is self-apparent that the presumption of innocence has been manifestly impugned upon by this conduct in the presence of the jury and prospective jurors. The resulting prejudice requires a new trial and that the United States Marshalls and other law enforcement officers be guided in their conduct so as to guarantee a fair and proper trial to both defendants and co-defendants in such circumstances.

3. The multiple, cumulative sentences imposed by the Court on petitioners is improper, not in accord with the applicable decisions of this Court nor in accord with decisions existant in various Courts of Appeals throughout the United States.

The indictment in the case at bar charges the defendants with a series of continuing acts and conduct constituting the crimes alleged in the indictment. Although eleven (11) counts are set forth in the indictment as separate crimes, a reading of the indictment makes it apparent that there is but one course of conduct complained of which gave rise to the multiple crimes charged in the indictment. The Courts have uniformly held that one act or course of conduct which is violative of separate and independent criminal or penal statutes should not

give rise to more than one prosecution or more than one punishment.

> Cf. *United States* v. *Greenberg*, D. C. N. Y. 1962, 30 F. R. D. 164;
> *Nelms* v. *United States*, C. A. Va. 1961, 291 F. 2nd 390.

In the case at bar the several offenses charged in the indictment arise out of a single transaction. However, they give rise to eleven (11) separate counts and subjected petitioners to eleven (11) separate punishments. The Court has imposed nine (9) separate punishments and the Court of Appeals for the Fifth Circuit has sanctioned the sentence imposed.

In *George B. Petite, petitioner* v. *United States of America*, October Term, 1959, Supreme Court, the Solicitor General moved to vacate a judgment of conviction and dismiss an indictment where the defendant had been convicted in the State Court of a crime arising out of the same transaction which formed the basis of the indictment and judgment of conviction in the Federal Court. The Solicitor General's brief in support of the motion to vacate, set forth the following observation:

> "It has generally been the policy of the Federal Government that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by the considerations both of fairness to defendants and of efficient and orderly law enforcement."

If any of the eleven (11) counts in the indictment at bar were prosecuted in the State Courts, any one conviction in the State Court would have brought the eleven

(11) counts in this indictment within the interdict and policy set forth in the Solicitor General's brief (*supra*). Succinctly, if there had been a prosecution and conviction in the Courts of the State of Florida for larceny involving one transaction set forth in this indictment, it would have been within the policy of the United States of America to vacate all eleven (11) counts of this indictment and dismiss the indictment against petitioners herein.

A *fortiorari*, in the instant case, where all eleven (11) separate counts are pending before the same Court arising out of the same transaction.

It is respectfully submitted that the multiple sentences imposed by the Court are contrary to the policy of the United States, the intendment of statutory law and due process of law.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20003

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

May 8, 1963

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

TUTTLE, Chief Judge: These are separate appeals on behalf of the five appellants who were tried and convicted in the Southern District of Florida for violating

the anti-fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §17(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the conspiracy provisions of the criminal Code, 18 U. S. C. A. §371. A sixth alleged conspirator, Holzapfel, named in the indictment, was granted a continuance and severance for trial. Certain counts of the indictment and certain overt acts of the conspiracy count were dismissed on motion of the Government prior to the submission of the case to the jury. The jury then found the appellants guilty on all nine counts submitted to them.

The grounds of the appeal may be divided generally into three categories. The first, applicable to all the appellants, is their contention that the indictments and convictions were based on evidence which was obtained by the Government as the fruits of an illegal seizure. The second is the contention, made separately, on behalf of all except Peel, that the evidence was insufficient to warrant submission of their respective cases to a jury. The third is based on alleged errors of the trial court having to do with overruling objections to the introduction of testimony and on other actions of the trial court.

We deal first with the contention of the defendants that the trial court erred in not suppressing, and in not excluding from evidence, the books and records of Insured Capital Corporation, the corporate vehicle through which the Government sought to prove the defendants carried on their fraudulent scheme. These books and records were obtained from the office of Insured Capital Corporation in Orlando, Florida, where they were in the formal custody of a Miss Edminson, who was the Secretary-Treasurer of the corporation. The record made before

the trial court on the motion to suppress, and in support of subsequent objections to the introduction of the records in evidence, shows that none of the appellants was an officer or director of the corporation at the time the records were obtained. Evidence which both the trial court and the jury could believe tended to prove that three persons, Peel, Holzapfel and one Miles, who testified on behalf of the Government and who was named as a co-conspirator, but not as a joint defendant in the prosecution, were the principal operators of the business that had been transacted at the office of Insured Capital Corporation. There was also evidence that Sills and Crane had both been engaged under the direction of the first named three persons in carrying on certain of the functions of the business, and that Zane and Gilmore had been present in Orlando or the office of the corporation only once or twice and held no office or position with the company.

In this state of affairs, the County Solicitor of Orange County, Florida, acting under a Florida statute, Section 32.20,[1] caused a subpoena duces tecum to be served on Miss Edminson to produce all of the books, ledgers, stock certificate books, bank records, and all other documents relating to the operation of Insured Capital Corporation. Miss Edminson complied with this subpoena and turned the corporation's books over to the state officer without demur or complaint. These records were retained in the office of the County Solicitor for approximately a year

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[1] "To have process.—The County Solicitor is allowed process of his court to summons witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons to testify before him as to any violation of the criminal law which they may be interrogated."

and a half without any demand being made for their return or any effort being made by the corporation, any of its officers, or any of the appellants seeking a return of the books. It does not appear that there was any office of the corporation maintained thereafter to which the books could be returned, or that there was any officer of the corporation who was interested in receiving them.

During the period of their custody by the County Solicitor's office, they were made available to investigators from the Securities & Exchange Commission and other federal agencies. Based at least in part on information obtained from the records, indictments were drawn and presented to the Federal Grand Jury, charging these appellants and Holzapfel with the offenses on which they have now been convicted. The books and records were actually subpoenaed by the United States Attorney a short time before the trial, after they had been physically surrendered by the County Solicitor's office to the United States Attorney's office for use on the trial.

Appellants contend that the acquisition of the records in this manner was an illegal seizure in violation of the Federal Constitution, and that under the principle announced in *Jones v. United States*, 362 U. S. 257, and *Henzel v. United States*, 5 Cir., 296 F. 2d 650, a decision by this Court, they have sufficient standing as "aggrieved persons" to have the documents suppressed when sought to be used against them.

It is clear that the *Jones* case, while greatly relaxing the requirement as to the interest an accused must have in order to have standing to attack an illegal search or

seizure, does not cover the factual situation such as here before us. In *Henzel* v. *United States*, this Court found that where a Federal Investigating Officer, by agreement with a state court receiver of a corporation which was wholly owned and wholly operated by the accused, obtained delivery of all of the corporation's and some of the accused's personal papers in an investigation that was being conducted against the accused, the seizure of the papers was illegal and the accused had adequate standing to attack the seizure. In arriving at this conclusion, however, this Court made the following caveat:

> "This is not to say that every employee of a corporation can attack the illegal seizure of corporate property if the fruits of the search are proposed to be used against him. Each case must be decided on its own facts. We only hold, under the facts presented here, the appellant had a sufficient interest in the property seized and premises searched to enable him to challenge the propriety of the Government's conduct under Rule 41(e)."

Here the subpoena duces tecum ran to the corporation and was served on the Secretary-Treasurer, the only person in charge of the corporation at the time of service. Appellants did not allege in the trial court that this acquisition of the records by the County Solicitor's office was itself illegal under the laws of the state of Florida. Nor did they allege that the Florida statute authorizing it violated the Federal Constitution. They do here in the Court of Appeals for the first time seek to attack the legality of this seizure by the state officials. Nevertheless we do find that the trial court, in passing on the motion to suppress, made a finding to the following effect:

Appendix A

> "The property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in (sic) the possession of officials of Orange County, Florida, until it was delivered to the United States Securities & Exchange Commission for use in the prosecution of this case, and that such property is now lawfully in control and possession of the United States Attorney for this District."

Thus it appears that for a period of more than a year the County Attorney's office was in possession of the papers, subject to the right of any person having a legal interest in them to seek their return; during this time the corporation ceased operating, if in fact it had ever been operating in the true sense of the word, and during the entire period of time no persons showed the slightest interest in these papers, or their custody. During this period, they were inspected by the Government agents and subsequently subpoenaed for use on the trial. We think we do not come to the question whether these appellants had standing to attack the seizure, because we find nothing in these circumstances that constitutes an illegal seizure even as to the corporation itself. As the proper custodian of the records of the corporation, Miss Edmunson had a right to act on behalf of the corporation to surrender the records to a public official on proper request, either with or without a formal subpoena duces tecum. Such surrender would be binding on the corporation. It has long been held that while a corporation is protected by the illegal search and seizure provisions of the Fourth Amendment (*Silverthorne Lumber*

Co., Inc. v. *United States*, 251 U. S. 385, that very case recognizes that a corporation's papers, unlike those of an individual who is to be prosecuted, are subject to subpoena. In commenting on *Linn* v. *United States*, 251 Fed. 476, the Supreme Court said:

> "In Linn *v.* United States . . . it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers; the rights of a corporation against unlawful search are to be protected *even if the same result might have been achieved in a lawful way.*" (Emphasis added)

Clearly the lawful way of achieving this result was by issuing a subpoena to cause the corporation's books to be produced. This is the basis of the decision in *Linn* v. *United States*. See also *United States* v. *White*, 322 U. S. 694 and *Hale* v. *Henkel*, 201 U. S. 43. Both of these cases explicitly deal with the right to subpoena a corporation's books, even though such books may tend to incriminate an officer or other person connected with the corporation.

There was, of course, available to the corporation the right to move to quash the subpoena, a matter to be tried by the Florida court before complying with the subpoena. See *Vano* v. *State*, 85 So. 2d 133. The availability of this right to a hearing before compliance satisfies the requirements of due process.

We next turn to the contentions by the several appellants that the evidence is not sufficient to warrant their conviction. We have carefully read the record references dealing with the testimony by which the Government seeks to tie Zane and Gilmore into the illegal acts. It is clear that the jury could believe that Peel, Holzapfel and

Appendix A

Miles had several conversations with these two appellants in their Miami office, and that together they worked out the plan which was actually put into effect—that is, that a company would be set up which would purport to sell its promisory notes to the investing public, which notes would bear interest at 8% and which purported to be secured by valid loans held by the company representing automobile or furniture chattel mortgages or purchase money notes, whereas in fact all of the proceeds from the sale of the notes by the corporation would be divided among the participants of the scheme. Moreover, we think it plain that the jury could believe testimony to the effect that substantial sums were actually paid for the benefit of Zane and Gilmore to their nominee, Mr. Bobbs Autos. Appellants attack the testimony dealing with the association of Zane and Gilmore with the operation on the ground that it was given substantially by a single witness, Miles, who was an admitted participant in the fraudulent transaction. While this circumstance leaves it open to the jury to view the testimony with skepticism, it does not destroy its weight or sufficiency once it is accepted as true by the jury. Once the trial court charged the jury adequately with respect to accomplice testimony, the jury could base its conviction entirely on the testimony of such accomplice. *Eyles v. United States*, 5 Cir., 249 F. 2d 744. Moreover as to part of Miles' testimony, there was corroboration. Gilmore and Zane were shown to have at least some interest in purchasing of the furniture for the Orlando operation from a furniture dealer in Miami. Miss Edminson testified that they came to the Orlando office "once or twice", that they "came in early one morning and left after

dinner," and that they talked with Miles and Crane, Sills and Peel. Furthermore, one of the checks drawn payable to Mr. Bobbs Autos, appears to have been endorsed by Zane. We conclude that the jury's verdict finding these two appellants participants in the crime was amply supported.

Looking next at the evidence seeking to implicate Sills and Crane, we find that in the latter period of the operation Crane was actually president of the company at a time when the investors were being bilked out of their so-called investments. Moreover the books and records of the corporation show that from March, 1960, to September, 1960, checks for $148,000 were made payable to Crane. Sills was a salesman whose only defense seems to have been that in making his sales he did not know that the corporation was a complete fraud. He used the names of Miles and Crane on some occasions. The fact that Sills himself participated in the false representations to some of the investors and, for substantial commission, caused substantial sums to be invested in the company which were thereafter used in a manner inconsistent with the representations brings him, as does the testimony against Crane, within the language of a recent case of this Court. We believe that the jury might well have believed, as we stated in *Sherwood v. United States*, 5 Cir., 300 F. 2d 603, 605, that it "was inconceivable that he did not know anything about the stock he and his salesmen were selling, especially in view of the fact that the Continental stock was virtually the only stock they were selling for an eight or nine month period."

Appellant Peel does not contend that there was not sufficient evidence on which the jury might find him guilty of the crimes charged. The investors' testimony, together with that of Miles, clearly prove that the Government's main contention with respect to the fraudulent transaction and the use of the mails pursuant thereto, as well as the conspiracy, were sufficiently proved to go to the jury as to all defendants.

We have carefully considered the contentions of Sills and Crane that the trial court deprived them of a fair trial by reason of "inflammatory and prejudicial statements." We conclude that appellants have made no such showing as this Court referred to in *Kowalsky* v. *United States*, 5 Cir., 290 F. 2d 161, where we said that with respect to such an attack there must be a "clear showing . . . that the conduct was such as to carry a prejudice with it." " There must be something more to justify a retrial than a mere suspicion or feeling that prejudice may have resulted from this course. It must appear plain and clear." In this long trial, the trial court showed no leanings which could reasonably be calculated to prejudice either the accused or the Government.

Equally without merit is the contention made by Sills and Crane that they were brought into the courtroom on the first day, prior to the commencement of the trial, with handcuffs on. The trial court sought to ascertain whether any of the jurors observed anything of this nature, and this investigation failed to show any of them noticed their entrance at all and thus failed to show any prejudice to the appellants.

The contention on Peel's behalf that he was prejudiced by an inadvertent remark during argument of

counsel for appellants Crane and Sills to the effect that Peel and Sills had not testified, does not warrant a determination by this Court that Peel was prejudiced by such remark which was inadvertently made by counsel for a co-defendant. The court took immediate and prompt action to correct the error. The case is quite different from *DeLluna* v. *United States*, 5 Cir. 308 F. 2d 140.

We have considered the other contentions made by the appellants but find that there is no merit in any of them. The judgment of the trial court, is therefore,

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 20003

D. S. Docket No. 1270—Ore. Crim.

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

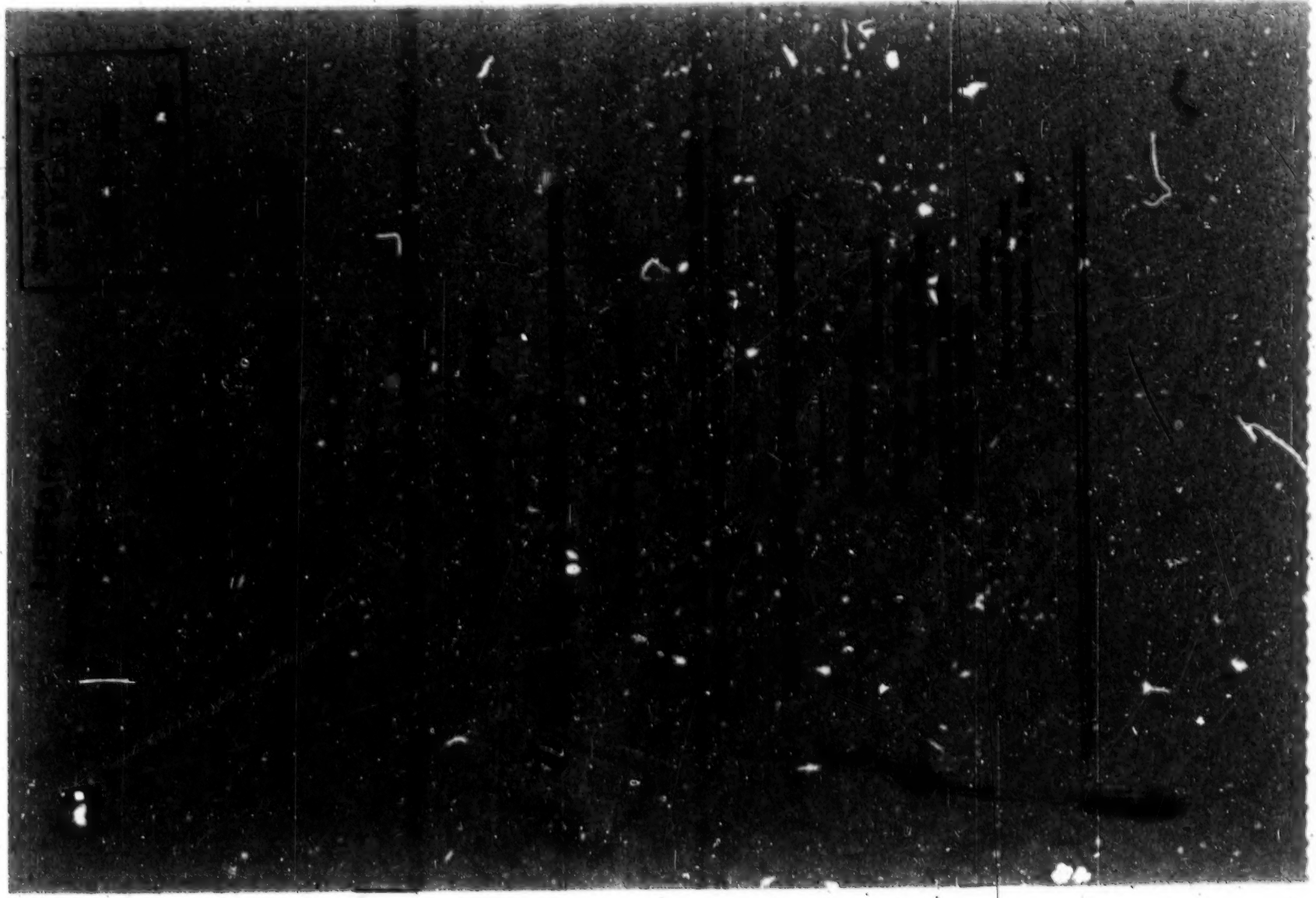
JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 8, 1963

Issued as Mandate:



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 369

JOHN JOSEPH CRANE AND ROBERT B. SILLS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 370

ROBERT ZANE AND HERBERT GILMORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. No. 369 and No. 370, pp. 13–23) is reported at 316 F. 2d 907.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1963. A petition for rehearing was denied on June 15, 1963. On July 19, 1963, Mr. Justice Black extended the time for filing petitions for writs

of certiorari to and including August 14, 1963. The petitions were filed on August 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could properly be imposed on counts charging separate mailings to different victims in execution of a scheme to defraud and a scheme to sell securities by fraud.

2. Whether the district court properly denied a motion to suppress as evidence the books of a corporation which had been subpoenaed for examination by a State officer under a State statute and subsequently made available to the United States Attorney.

3. Whether the trial court erred in ruling that the prospective jurors had not seen any defendant in shackles and handcuffs.

STATUTES INVOLVED

Section 17(a) of the Securities Act of 1933, 48 Stat. 74, as amended, 68 Stat. 686 (15 U.S.C. 77q(a)) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 24 of the Securities Act of 1933 (15 U.S.C. 77x) provides:

> Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post

> Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 32.20 of the Florida Statutes provides:

> To have process—The county solicitor is allowed the process of his court to summon witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated.

STATEMENT

Petitioners and two other individuals were charged in the United States District Court for the Southern District of Florida with various offenses resulting from a scheme to defraud. Counts 1, 2, 3 and 5 charged them with the use of the mails in the sale of securities (15 U.S.C. 77q); Counts 6 through 9 charged mailings in execution of a scheme to defraud (18 U.S.C. 1341); and Count 11 charged a conspiracy to commit these offenses (18 U.S.C. 371). Each substantive count named a different victim to whom a communication was sent, and the four overt acts of the conspiracy count submitted to the jury named four additional victims (R. 2339-2350). Two other counts (Counts 4 and 10) were dismissed by the court. Petitioners were convicted on all nine counts sub-

mitted to the jury. Each was sentenced to imprisonment for a total of eighteen years, the court imposing sentences of two years on each count to run consecutively (R. 2544–2548).

The sufficiency of the evidence is not challenged here. In brief, it showed that in 1959 and 1960, petitioners engaged in an organized scheme whereby they established a corporation, the Insured Capital Corporation, which purportedly sold its secured promissory notes to the public on representations that it used the funds to purchase secured chattel mortgages. In fact, the promissory notes were worthless with no secured backing and the proceeds were divided among the participants in the scheme.

Investors were attracted to the company by advertisements which stated that eight percent interest would be paid on their investments and that the principal amounts would be repaid in a year (*e.g.*, R. 117–119). When the investor went to the company offices, he would be told that the investment would be secured by collateral, generally auto loans, with a security valued at 20% more than the investment (*e.g.*, R. 380–381). The investor would be given collateral paper of no value (R. 811). The company would pay interest for a period of time but would not repay the principal (*e.g.*, R. 219). At the trial 19 victims testified that they had invested varying amounts ranging from $1,000 to $15,000 (R. 547, 552, 572, 650). The company had a paid capital of only $500 and its only income amounted to $84.68. Its books showed that it took in $241,308, repaying but $27,000 to its investors.

The books also revealed that approximately $176,000 in checks were made payable directly or indirectly to the company officers. (R. 794, 1700–1726).

ARGUMENT

1. It has long been settled that each separate use of the mails in execution of a scheme to defraud constitutes a separate offense under the mail fraud statute. *Badders* v. *United States*, 240 U.S. 391; *In re Henry*, 123 U.S. 372. This Court has rejected the argument, urged by petitioners, that the existence of a scheme to defraud makes the crime a continuous offense. Rather it has ruled that each mailing "consists of a single isolated act, and is repeated as often as the act is repeated." 123 U.S. at 374. These rulings have been consistently followed by the courts of appeal. See, *e.g.*, *Mitchell* v. *United States*, 142 F. 2d 480 (C.A. 10), certiorari denied, 323 U.S. 747; *Bozel* v. *United States*, 139 F. 2d 153 (C.A. 6), certiorari denied, 321 U.S. 800; *United States* v. *Hill*, 71 F. 2d 159 (C.A. 3). In this case, it is not even necessary to rely merely upon the separateness of the mailings. Here, not only were the mailings separate but each mailing was to a separate victim of the scheme to defraud.

The same ruling is applicable when the mailings are charged to violate the Securities Act of 1933 rather than the general mail fraud statute. See *Palmer* v. *United States*, 229 F. 2d 861, 867 (C.A. 10), certiorari denied, 350 U.S. 996. The history of the Securities Act does not indicate that Congress intended to differentiate between frauds in the purported sale of promissory notes and frauds in the

purported sale of items not constituting securities where the swindler merely uses this device as a means to funnel the money into his own pocket. See S. Rep. No. 47, 73d Cong., 1st Sess.; H. Rep. No. 85, 73d Cong., 1st Sess.

The Second Circuit has not held to the contrary, as petitioners contend. In *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2), in rejecting an argument that a prosecution could not be transferred for lack of venue to another district where there were no mailings, the court did state that the gist of the crime was the fraudulent scheme and not the mailings, but was not called upon to decide and did not rule on the question whether separate mailings constituted separate offenses under the securities statute.

Even if the gist of the crime under the Securities Act is not the separate mailings, the cumulative sentences imposed here were justified. Section 17(a)(3) of the Securities Act provides that it shall be unlawful for any person in the offer or sale of any securities "to engage in any transaction * * * which operates or would operate as a fraud or deceit upon the purchaser." These words indicate that Congress intended that each fraudulent transaction constitute a unit for purposes of prosecution. Each of the Securities Act counts alleges just such a separate fraud-

[1] It is true that several district court cases in that circuit have held that each separate use of the mails does not constitute a separate crime under the Securities Act. *United States* v. *Hughes*, 195 F. Supp. 795 (S.D.N.Y.); *United States* v. *Greenberg*, 30 F.R.D. 161 (S.D.N.Y.). But the decisions in the Southern District of New York have not been consistent. See *United States* v. *Van Allen*, 28 F.R.D. 329, 341-344 (S.D.N.Y.).

ulent transaction. Thus, each of the counts charged that the fraud was perpetrated upon a particular purchaser of a promissory note, different from the particular person singled out in the mail fraud counts and different from each other. Accordingly, petitioners received separate sentences for executing their fraudulent scheme on separate victims in separate transactions. The defrauding of one victim does not immunize petitioners from further punishment when they chose to utilize the same means to swindle others. The defrauding of each separate person is a separate transaction. Essentially this case is no different from one where separate punishments are imposed for different bank robberies or different larcenies employing the same method of operation.[2]

2. In October 1960, the books and records of the Insured Capital Corporation were subpoenaed from its then Secretary-Treasurer under a state statute, Fla. Stat. Ann. § 32.20, to be produced before the County Solicitor. The Secretary-Treasurer, with the assistance of deputy sheriffs, delivered the records to the Solicitor (R. 92–95, 179–180, 183–184). On October 27, 1960, a government accountant examined these records at the Solicitor's office (R. 278–280). In March 1962, shortly before the trial of this case, the Solicitor, assured that the records would be covered by a trial subpoena, turned over the records

[2] Petitioners also received a cumulative sentence of two years on the conspiracy count (count 11). Since the substantive offenses charged could have been committed by a single person, the conspiracy to commit those offenses is subject to separate punishment. *Pereira* v. *United States*, 347 U.S. 1; *Callanan* v. *United States*, 364 U.S. 587.

to a government accountant and a state agent (R. 240, 251, 256–257, 266). The Solicitor subsequently received a trial subpoena for the records (R. 262). At the trial, petitioners moved to suppress these records as evidence, alleging that the records had been illegally seized and that their use at the trial violated the privilege against self-incrimination (R. 89, 344–351). The trial court, in denying these motions, found, *inter alia*, that the books were legally acquired by the County Solicitor and by the United States Attorney (R. 343–344, 351).

The ruling of the trial judge, affirmed by the court below, was correct. Corporation books and records may properly be subpoenaed. They are not within the privilege against self-incrimination. *Wilson* v. *United States*, 221 U.S. 361; *Curcio* v. *United States*, 354 U.S. 118. Here the books were in fact subpoenaed under a state statute and were subsequently subpoenaed for the trial. The fact that the County Solicitor voluntarily turned them over to the government accountant for inspection prior to the issuance of the subpoena raises no substantial constitutional question in view of the fact that the books would have been producible under Rule 17(c), F.R. Crim. P.

3. There is no merit to petitioners' contention that the jury saw the defendants (other than petitioners Zane and Gilmore) in shackles and handcuffs. This contention was raised prior to the impanelling of the jury and the trial judge interrogated the three jurors who might have observed the petitioners when they were brought into the courtroom. These jurors denied that they saw petitioners (R. 18, 34–42).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1963.